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ADMITTED IN D.C. AND VA

September 15, 1995

OUR FILE NO.
0258-100-63

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Comments of Noble Broadcast Group, Inc.
IB Docket No. 95-91
GEN Docket No. 90-357
RM No. 8610

Dear Mr. Caton:

Transmitted herewith on behalf of Noble Broadcast Group, Inc., are an original and nine copies of its Comments in response to the Notice of Proposed Rulemaking issued in the above-captioned proceeding.

If there are any questions concerning this submission, please contact the office directly.

Sincerely,

John M. Pelkey

JMP/ned

Enclosures: (10)

Before The
Federal Communications Commission
Washington, D C 20554

In The Matter Of	)	IB Docket No. 95-91
	)	GEN Docket No. 90-357
Establishment of Rules and Policies	)	RM No. 8610
for the Digital Audio Radio Satellite	)	PP-24
Service in the 2310-2360 MHz	)	PP-86
Frequency Band	)	PP-87

TO: The Commission

COMMENTS OF
NOBLE BROADCAST GROUP, INC.

Noble Broadcast Group, Inc. ("Noble"),[1] through counsel, hereby submits its Comments with respect to the Commission's *Notice of Proposed Rulemaking* ("*Notice*") issued in the above-captioned proceeding. In the *Notice*, the Commission sets forth its proposed rules and policies governing satellite-delivered digital audio radio service ("DARS") in the 2310 - 2360 MHz band. For the reasons explained below, Noble urges the Commission to pay special heed to the adverse impact that this new service undoubtedly will have on terrestrial broadcast service and to adopt rules and procedures that will help to ensure the continued viability of the local broadcast service that has formed an integral part of community life in this country for nearly three-quarters of a century.

I. Introduction: Commissioner Quello's Reservations are Well Founded

In his Separate Statement to the *Notice*, Commissioner Quello accurately perceives the analogy between the DARS rulemaking and the

[1] Noble's wholly-owned subsidiary, Noble Broadcast Licenses, Inc., is the licensee of KBCO-AM/FM, Boulder, Colorado; KHOW(AM) and KHIH(FM), Denver, Colorado; WVKS(FM), WSPD(AM) and WLQR(FM), Toledo, Ohio; KNJZ(FM), Alton, Illinois; and KMJM(FM) and KATZ(AM), St. Louis, Missouri.

Commission's ill-fated attempt to encourage diversity and coverage of underserved areas in the Docket 80-90 rulemaking proceeding. That rulemaking, which was accompanied with much public fanfare, was to have increased the level of service to underserved areas[2] and to have increased the availability of "niche" programming, particularly minority and educational programming[3]. It is now clear that the stated expectations were not met. Rather than focusing on underserved areas, stations that came into existence as a result of the Docket 80-90 proceeding naturally focused their attentions on larger nearby markets because the intensified competition in the smaller communities made it difficult, if not impossible, for stations to survive based solely on revenues from the smaller markets. The hoped-for increase in the number of educational stations never materialized and increases in the level of minority programming arose not so much from the increase in the number of stations as from demographic changes.

Rather than focusing on "niche" markets, the Docket 80-90 stations were forced to engage in head-to-head combat with established stations. Market revenues did not increase proportionately to the increase in the number of stations. As a result, profit margins dissipated and many broadcasters were forced to reduce operating costs by reducing or eliminating local programming. Many stations were unable to stay afloat.[4]

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2 *FM Broadcast Stations*, 94 FCC 2d 152, 157-161 (1983).

3 *Implementation of BC Docket No. 80-90*, 100 FCC 2d 1332, 1333 (1984).

4 In its Comments filed in this proceeding (the "NAB Comments"), the National Association of Broadcasters explains that the stations added between 1985 and 1993 in the 36 markets studied by Kagan Media Appraisals caused average cash flow losses of approximately 50 percent in large and medium markets and 121 percent in small markets.

The decade beginning with the adoption of Docket 80-90 saw an unprecedented number of broadcast bankruptcies and foreclosures.

That the Docket 80-90 proceeding would have had such an adverse impact on broadcasting should have been foreseen by the Commission, but was not. In general, neither the number of listeners nor the amount of listening by any individual listener rises proportionately to an increase in the number of media outlets. Thus, when new 80-90 stations were added into a market, overall listenership did not rise proportionately. This meant that station shares decreased, with a corresponding decrease in revenue.

As is explained in the NAB Comments filed concurrently herewith, the industry's customary method of combating decreased revenues is to decrease expenses. In the case of the decreased revenues brought about by the Docket 80-90 stations, this meant that stations were forced to lay off staff, reduce local programming and increasingly rely on satellite-delivered (i.e., national) programming. Thus, the direct result of the Docket 80-90 proceeding was a decrease in localism.

The Commission can learn from the mistakes of the Docket 80-90 debacle. Terrestrial broadcasters were placed in jeopardy because of the addition of the relatively few 80-90 stations created in each market. DARS technology proposes to add 30 or more channels per system in each market. As a result, terrestrial broadcasters could wind up facing competition from more than 100 additional stations in each market. Under these circumstances, the Commission, if there is to be any hope of ensuring the continued existence of local broadcasting, must take all steps possible to blunt the blow that will fall upon terrestrial broadcasters as a result of the implementation of DARS.

II. Ownership Limits

The Commission acknowledges in the NPRM that each DARS system will be able to provide 30 or more channels of national digital audio programming. By contrast, terrestrial broadcasters are currently prohibited from owning more than two FM stations in a market. Although legislation that would eliminate this restriction has passed both Houses of Congress, it is not, as of the date of the submission of these Comments, law. In the event that the legislation does not become law, the Commission must ensure a level playing field for both satellite and terrestrial broadcasters. Toward that end, the Commission must eliminate the restrictions on the number of broadcast outlets that can be owned by a terrestrial broadcaster.

III. Terrestrial DAB

The Commission particularly solicits comment on any innovative measures that terrestrial radio stations may take to respond to competition from DARS.[5] In particular, the Commission wishes to receive comment on the possible implementation of digital transmission techniques by terrestrial broadcasters.[6]

To a large extent, the implementation of any digital transmission techniques is a matter over which any individual broadcaster currently has little or no control. Until the FCC establishes the ground rules for the use of digital techniques by terrestrial broadcasters, the hands of the terrestrial broadcasters are tied. Unfortunately, it appears to be the case that the implementation of digital audio broadcasting by terrestrial broadcasters is

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5 *Notice* at ¶ 19.

6 *Id.*

lagging behind the implementation of satellite DARS. To ensure that DARS providers do not achieve an unfair advantage by receiving a head start, the Commission should adopt a timetable for the adoption and implementation of terrestrial DAB that will ensure terrestrial broadcasters at least have the ability to implement the use of digital technology at the same time that the satellite DARS systems become operational.

IV. Terrestrial Gap-Fillers

The *Notice* notes that some of the satellite DARS applicants have indicated that they intend to operate terrestrial repeaters or "gap-fillers" in those areas in which it may be difficult to receive DARS signals.[7] Although not identified as such, these "gap-fillers" are nothing less than terrestrial DAB systems that can be used only by the holders of DARS licenses. This arrangement is doubly inequitable. First, it would give DARS operators the right to own 30 or more stations in the market, while terrestrial broadcasters are still limited in the number of stations they can own. Second, it would provide satellite DARS operators with a head start in the provision of terrestrial DAB service.

Apart from the question of the inequity of the proposal to allow the use of terrestrial gap-fillers, the fact is that the use of such fillers runs directly contrary to the basic concept of satellite DARS. To the extent that satellite DARS is at all innovative, it is novel because of its use of satellites to reach the end-user directly. If satellite DARS providers are to be permitted to use gap-fillers, the service will be no different than terrestrial DAB. Under such circumstances, there would be no reason even to have created the

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[7] *Notice* at ¶ ¶ 55 and 56.

Digital Audio Radio Satellite Service, much less to have insulated the providers of that service from the rigors of the processes that the Commission has traditionally used for the awarding of new facilities authorizations. Succinctly put, gap-fillers turn the Digital Audio Radio Satellite service into an end-run around the Commission's processes for the benefit of the few at the expense of the many.

V. The Commission Should Permit Additional Parties to File Applications for the Digital Audio Radio Satellite Service

From the tenor of the NPRM, it appears that the Commission is predisposed to award authorizations for the entire 50 MHz that has been made available for the DARS service and to award that spectrum to the four applicants whose applications were filed at the beginning of this decade. By so doing, however, the Commission would deprive itself of the ability to respond to changes in technology and would prevent broadcasters, who have extensive experience in providing service to the public, from participating in the very service that threatens their continued viability.

Several years have elapsed since the submission of the pending applications. The Commission should reopen the application process so as to apprise itself of any innovations that may be offered by applicants in light of the significant advances that have taken place in technology since the early '90s. Similarly, by preventing new applicants from applying for DARS authorizations, the Commission is depriving itself of the opportunity of receiving proposals from terrestrial broadcasters, many of whom have programming experience that far exceeds that of the DARS applicants.[8]

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[8] Recently, the Commission proposed to return nationwide, noncommercial 220 MHz applications filed in 1991 and to award the authorizations for that service by auction. *Amendment of Part 90* (PR Docket No. 98-552) Adopted July 28, 1995; Released August 28,

Although the Commission's concern with the level of investment made by the four applicants is understandable, it should not lose sight of the fact that terrestrial broadcasters have made an even greater investment in equipment. The Commission should not permit its sensitivity toward the investment made by the four DARS applicants to blind it to the need to permit broadcasters to become part of a service that has the potential for undermining the foundations of a competing service in which so much has been invested.

VI. DARS Should be Offered on a Subscription Basis Only

Three of the four current DARS applicants propose to operate their systems on a subscription basis.[9] Noble urges the Commission to adopt a rule requiring that DARS be provided on a subscription basis. In this way, the Commission can help to ensure the continued viability of terrestrial broadcasters.[10] Moreover, the Commission's preliminary determination that DARS is not a broadcast service mandates such a limitation. If DARS can be received by anyone, without the necessity of subscribing to the service, it becomes a broadcast service. In that case, the full panoply of Title III regulation must apply.

1995. If the Commission can propose to return four-year old applications in that case, where the service does not pose a realistic competitive threat, it can certainly open up at least a portion of the spectrum in the present case where broadcasters face possible extinction if DARS is successful.

9 *Notice* at ¶ 25.

10 As is explained in greater detail in the concurrently-filed NAB Comments, DARS provides less of a threat to broadcasters as a subscription service than it does as a free, advertiser-supported service.

VII. The DARS Providers Must Share in the Public Interest Obligations Imposed Upon Broadcasters

Because DARS will be attempting to provide service that is similar to the service being provided by terrestrial broadcasters, it makes sense to ensure that the public interest is served in the same manner that the Commission requires of terrestrial broadcasters. Three types of public interest obligations must be imposed upon DARS providers:

First, DARS providers must, like terrestrial broadcasters, comply with the Commission's EEO requirements. Those requirements are imposed upon broadcasters as a means of helping to ensure the availability of programming particularly keyed to the interests of minorities.[11] The Commission's concerns with respect to the availability of such programming should be the same regardless of whether the programming is provided from a terrestrial antenna several hundred feet in height or a satellite several hundred miles above the ground, particularly since the Commission has created the DARS service in part because of its potential for providing programming to minorities.[12]

Second, the political obligations that are imposed upon terrestrial broadcasters should be imposed upon DARS providers. The purpose of the Commission's political policies is to ensure reasonable access to federal candidates and like treatment of all candidates. Given the nationwide coverage of DARS service and assuming that the DARS service will be

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11 *See NAACP v. FPC*, 425 U.S. 662, 670 n. 7 (1975).

12 *See Notice* at ¶ 2.

providing service to underserved areas,[13] imposition of political carriage requirements on DARS providers is essential if candidates are to be able to have their message heard. If the Commission decides to award DARS authorizations only to the four current applicants, imposition of political obligations upon DARS providers is especially necessary to ensure that candidates for the same office are not unfairly treated given the fact that the limited number of DARS providers may make it difficult for a candidate to receive equal opportunities.

Third, just as terrestrial broadcasters are required to determine the problems, needs and interests of their service area, so should DARS providers be required to determine the problems, needs and interests of their much larger service areas and to provide programming that is responsive to those problems, needs and interests, especially given the Commission's reliance upon DARS providers' furnishing of niche programming as the basis for affording special treatment to those providers. The furnishing of such programming is an added cost that must be borne by terrestrial broadcasters, but it is a cost that terrestrial broadcasters understand is part and parcel of their obligations to their listeners. Although terrestrial broadcasters have been willing to provide such programming, the continued provision of such programming is an expense that terrestrial broadcasters should not be required to bear if DARS providers are to be exempted from the requirement to supply such programming. Once again, the question is one of basic equity. The DARS providers will be in direct competition with

[13] It should be noted, however, that, despite claims to the contrary, it is not at all clear that underserved areas continue to exist in the United States. According to the NAB 1995 County Radio Listening Study cited in the NAB Comments, only .003 percent of the total U.S. population (6,100 out of 210 million people) live in counties receiving less than 6 radio stations.

broadcasters and it makes no sense to impose the costs of providing public interest programming on terrestrial broadcasters but to exempt DARS providers from the requirement to provide such programming.

VIII. Conclusion

The Commission stands at the threshold of committing the very same mistake that it made in the infamous Docket 80-90 proceeding. In the interest of encouraging diversity and coverage of underserved areas, it will unwittingly decrease the diversity of local programming in favor of computer-generated formats pre-digested for a homogenous, national audience. To avoid this result, which is in the interest of no one other than the DARS providers, the Commission must craft the rules and policies adopted in this proceeding in a manner consistent with the above Comments and thereby minimize the adverse effects of DARS technology.

Respectfully submitted,

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